

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
ORANGEBURG DIVISION

Unula Boo Shawn Abebe, #285447,)	C/A No. 5:12-187-MBS-KDW
)	
Plaintiff,)	
)	
vs.)	<u>ORDER AND OPINION</u>
)	
Assistant Solicitor Moring; Unknown)	
Assistant Solicitor; and Spartanburg)	
County Sheriff's Department,)	
)	
Defendants.)	
)	

On January 19, 2012, Unula Boo Shawn Abebe ("Plaintiff"), a state prisoner, filed a pro se action against the Spartanburg County Sheriff's Department ("SCSD") and two Assistant Solicitors (the "Solicitors") (collectively "Defendants"). ECF No. 1. Plaintiff asserts a violation of the Equal Protection Clause of the Fourteenth Amendment pursuant to 42 U.S.C. § 1983, as well as claims for selective enforcement, selective prosecution, and malicious prosecution under state tort law. *Id.* In accordance with 28 U.S.C. § 636(b) and Local Rule 73.02, D.S.C., this matter was referred to United States Magistrate Judge Kaymani D. West for pretrial handling. The Magistrate Judge reviewed the complaint pursuant to the provisions of 28 U.S.C. §§ 1915, 1915A, and the Prison Litigation Reform Act. On March 26, 2012, the Magistrate Judge issued a Report and Recommendation in which she recommended that Plaintiff's claims be summarily dismissed. ECF No. 17. On April 6, 2012, Plaintiff filed a motion to amend his complaint and, on April 9, 2012, objections to the Report and Recommendation. ECF No. 19 & 21.

I. RELEVANT FACTUAL AND PROCEDURAL BACKGROUND

The relevant facts, stated in the light most favorable to Plaintiff, are as follows. ECF No. 1 at 2. On May 9, 2009, while being held as a detainee at the Spartanburg County Detention Center (“SCDC”), Plaintiff, a black male, was twice assaulted by white correctional officers. *Id.* In the first instance, Officer Jonathan Cummings instructed another officer to use a taser against Plaintiff even though he had complied with the officers’ orders and was face down on the ground. *Id.* Thereafter, while en route to the Spartanburg Regional Hospital, an officer whispered to Plaintiff, “we’re going to fuck your little black ass up.” *Id.* When Plaintiff returned to SCDC, eight officers held him to the ground and “punched and stomped” him, accusing Plaintiff of assaulting Officer Cummings. *Id.* Plaintiff was sprayed with mace and left for several hours in a cell without water. *Id.* The following day, Plaintiff learned from other inmates that there is a history of officers at SCDC beating African-American inmates. *Id.* at 3.

On March 25, 2010, Plaintiff was charged with the assault and battery of Officer Cummings. *Id.* The unknown Assistant Solicitor who handled the case knew that Plaintiff had been assaulted by all white officers. *Id.* On November 30, 2011, Assistant Solicitor Moring met with Plaintiff and advised him that his office intended to pursue the charges against him. *Id.* The Solicitors understood that Plaintiff sought to have criminal charges brought against the officers who assaulted him but no indictment has been issued. *Id.* Plaintiff is aware of a white detainee who assaulted an officer at SCDC but was neither assaulted in response nor criminally charged. *Id.*

Plaintiff alleges, “[t]he defendants are discriminating against me because of my race and are prosecuting me only and not the officers because I’m black and they are white.” *Id.*

Plaintiff's claims also appear to be based on the Solicitors' decision not to prosecute the white detainee who assaulted a correctional officer at SCDC. *Id.* Plaintiff seeks monetary damages and the Solicitors' civil arrest pursuant to FED. R. CIV. P. 64. *Id.* at 4. In addition, Plaintiff seeks a preliminary injunction against Defendants requiring them to "stop violating [Plaintiff's] rights to equal protection." *Id.*

II. STANDARD OF REVIEW

The Magistrate Judge makes only a recommendation to this court. The recommendation has no presumptive weight. The responsibility for making a final determination remains with this court. *Mathews v. Weber*, 423 U.S. 261, 270 (1976). This court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the Magistrate Judge. 28 U.S.C. § 636(b) (1). This court may also receive further evidence or recommit the matter to the Magistrate Judge with instructions. *Id.*

The court must dismiss any action or claim filed by an inmate if the court determines that the action or claim is frivolous or fails to state a claim on which relief may be granted. *See* 28 U.S.C. §§ 1915(e)(2), 1915A(b)(1); 42 U.S.C. § 1997e(c). The first standard includes claims based upon "an indisputably meritless legal theory," "claims of infringement of a legal interest which clearly does not exist," or claims where the "factual contentions are clearly baseless." *Neitzke v. Williams*, 490 U.S. 319, 327 (1989). The second standard is the familiar standard for a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), accepting a plaintiff's factual allegations as true. A complaint needs "a short and plain statement of the claim showing that the pleader is entitled to relief" and sufficient "[f]actual allegations . . . to raise a right to relief above the speculative level" *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (internal

quotation marks omitted). A plaintiff's basis for relief "requires more than labels and conclusions" *Id.* Therefore, a plaintiff must "allege facts sufficient to state all the elements of [the] claim." *Bass v. E.I. DuPont de Nemours & Co.*, 324 F.3d 761, 765 (4th Cir. 2003).

III. DISCUSSION

A. *Summary Dismissal*

1. *The Magistrate Judge's Report and Recommendation*

Upon review, the Magistrate Judge concluded that Plaintiff's claims for monetary damages brought pursuant to 42 U.S.C. § 1983, should be dismissed because each of the Defendants is immune from suit. The Magistrate Judge found that, in South Carolina, a sheriff or a sheriff's department is an arm of the state. Therefore, the Magistrate Judge concluded that SCSD is immune from suit under the Eleventh Amendment. *See Carroll v. Greenville County Sheriff's Dep't*, 871 F. Supp. 844, 846 (D.S.C. 1994). The Magistrate Judge determined that the Solicitors, whose position in South Carolina is equivalent to that of a prosecutor, have absolute immunity in this case because Plaintiff's suit is based on the Solicitors' performance of a "traditional prosecutorial dut[y]," the decision whether to seek an indictment and initiate criminal proceedings. *Nivens v. Gilchrist*, 444 F.3d 237, 250 (4th Cir. 2006).

As a consequence of finding that Defendants are immune from suit, the Magistrate Judge concluded that Plaintiff's requests for a preliminary injunction and the Solicitor's civil arrest should be denied. The Magistrate Judge added that, insofar as Plaintiff seeks an injunction that would interfere with pending state criminal proceedings, Plaintiff has failed to sustain the heavy burden required of a plaintiff requesting that type of equitable relief. *See Younger v. Harris*, 401 U.S. 37, 43-5 (1971).

After concluding that Plaintiff's federal claims should be dismissed, the Magistrate Judge recommended that the court abstain from exercising supplemental jurisdiction over Plaintiff's state law claims. *See* 28 U.S.C. § 1367(a).

2. Plaintiff's Objections

Plaintiff challenges the Magistrate Judge's finding that the Solicitors have absolute immunity from suit. ECF No. 21. To that end, Plaintiff contends that the Solicitors' conduct was administrative, rather than prosecutorial. *Id.* Although a prosecutor does not have immunity for conduct that is administrative, *Van de Camp v. Goldstein*, 555 U.S. 335, 343 (2009), the decision whether to initiate a prosecution is the quintessential prosecutorial function that justifies immunity from suit. *See Imbler v. Pachtman*, 424 U.S. 409, 430 (1976). Because Plaintiff is challenging the Solicitors' decision to indict Plaintiff, the court agrees with the Magistrate Judge's finding that the Solicitors are immune from suit.

Plaintiff objects to the Magistrate Judge's finding that SCSD is immune from suit under the Eleventh Amendment. As the Magistrate Judge observed, in South Carolina, it is well-recognized that a sheriff's department is an agency of the state protected by sovereign immunity. *See, e.g., Cromer v. Brown*, 88 F.3d 1315, 1332 (4th Cir. 1996); *Gulledge v. Smart*, 691 F. Supp. 947, 954–55 (D.S.C. 1988), *aff'd*, 878 F.2d 379 (4th Cir. 1989); *Carroll v. Greenville County Sheriff's Dep't*, 871 F. Supp. 844, 846 (D.S.C. 1994) (finding a suit against the sheriff's office to be a suit against the state); *Millmine v. County of Lexington*, No. 182875, 2011 WL 182875 at *5 (D.S.C. Jan. 20, 2011) ("In South Carolina, a sheriff's department is an agency of the state, not a department under the control of the county."). Accordingly, the court agrees with the Magistrate Judge's determination that SCSD is immune from suit.

B. Motion to Amend

Because service of process has not yet been authorized, Plaintiff is entitled to amend his complaint “once as a matter of course.” *See* FED. R. CIV. P. 15(a)(2). However, even when a party may amend as a matter of course, leave to amend may be denied if there is bad faith, undue prejudice to the opposing party, or futility of amendment. *See United States v. Pittman*, 209 F.3d 314, 317 (4th Cir. 2000). Plaintiff’s proposed amended complaint identifies by name the unknown Assistant Solicitor and includes several other minor changes, none of which affects the court’s immunity analysis. In substance, the proposed amended complaint is identical to the original complaint. For the same reasons discussed above, Plaintiff’s proposed amended complaint would be subject to summary dismissal. Accordingly, Plaintiff’s motion to amend is denied.

IV. CONCLUSION

For the reasons set forth above, the court adopts the Magistrate Judge’s Report and Recommendation and incorporates it herein by reference. Plaintiff’s complaint is dismissed and his motion to amend is denied.

IT IS SO ORDERED.

s/ Margaret B. Seymour
Margaret B. Seymour
Chief United States District Judge

Columbia, South Carolina
November 26, 2012